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MICHAEL RODAK, J

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1326

DONALD BUFORD, et al.,
Petitioners,

v.

THE SOUTHEAST DUBOIS COUNTY SCHOOL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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No. .....

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v.

THE SOUTHEAST DUBOIS COUNTY SCHOOL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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The petitioners:

Donald Buford, Charles A. Roll, Noel Andry Herbert C. McKinney, Clyde Andry, Edward Stroud, Shirley D. Stroud, Charles Ridenour, Arvel Andry, Edw. Dillard, Violet Dillard, Ada Ford, Leafa Andry, Mary M. Dooley, Riley D. Huff, Margaret Huff, Thomas Van Winkle, Lloyd A. Wright, Sr., Eithel Wright, Charles L. Morgan, Lulabelle Morgan, Carolyn King, Clyde

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Kellems, Carl O. Steffen, Frances M. Steffen, Virginia Clark, Oather Garland, Norma Harmon, and Pearl Linthicum,

respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 25, 1973.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of Indiana.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 25, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1). (No petition for rehearing was filed.)

QUESTIONS PRESENTED

1. Whether petitioner's Protestant children have a First Amendment right to attend a purely public school, or whether they must attend a school public in name, but leased from the Roman Catholic Church, located in a Roman Catholic enclave, governed by an all Catholic school board and superintendent, instructed by some members of Catholic religious orders, instructed with a differentiation based upon religion, with a school library shelved with Catholic books and periodicals, and with an atmosphere of religious discrimination and hostility.

2. Whether First Amendment rights must yield to such considerations as the comparative quality of school facilities.

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, 1st Amendment, provides in its relevant parts:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

STATEMENT OF THE CASE

This was an action to enjoin the closing of a public high school, on First Amendment grounds, alleging that the high school closed was a purely public one, but that the school which petitioners' Protestant children were now forced to attend was Roman Catholic dominated, oriented, and influenced. On August 24, 1971, the petitioners filed their complaint for an injunction in the United States District Court for the Southern District of Indiana. Three days later petitioners filed a petition for a preliminary injunction. On September 15, 1971, by counsel, the respondent filed its answer asserting three defenses: Laches; a denial of the essential allegations of petitioners' complaint; and that, other than the First Amendment issue raised by the complaint, any other issue therein was the subject of a pending state court action. On September 16, 1971, a hearing was held on petitioners' request for a preliminary injunction. At the conclusion of this hearing, parties agreed that the trial on the merits should be advanced and consolidated with that hearing, and the Court so ordered. The action was brought against the School Corporation and not individuals, but no objection was raised to any jurisdictional defect, and the Court proceeded to determine the First Amendment issue. The trial Court denied the petitioners' application for injunction.

The facts material to the consideration of the questions presented may be summarized thus: Birdseye is a small Indiana town, with everyone—but two families—of the Protestant faith. R. 80. Ferdinand is another small Indiana town in which everyone is of the Catholic faith. R. 80-81. Prior to the beginning of the Fall School Term of 1971, Birdseye had its own high school with an enrollment of 104 students. R. 159. This school building is still in use for certain educational purposes. R. 157. The respondent school corporation is purchasing the former Catholic High School building at Ferdinand from the Catholic Diocese of Evansville, Indiana, under a lease-purchase agreement. R. 10, 245. Starting with the Fall, 1971, term of school, the former Birdseye High School students are being transported to the former Catholic School at Ferdinand. R. 158-159. The subject school building is owned by the Catholic Diocese of Evansville, Indiana, subject to a lease-purchase agreement with the respondent. R. 10, 245. It was formerly a Catholic school. The physical surroundings of the subject school are those which lend themselves to the appearance of a Catholic enclave. R. 86, 89. There are religious crosses on some of the buildings adapted to educational purposes by the respondent school corporation. R. 114. There are also pictures with a religious theme in some of the classrooms. R. 116. The entire membership of the respondent school corporation is of the Roman Catholic faith. R. 87. The school superintendent of the respondent is a Roman Catholic. R. 87. This school superintendent maintains a *laissez faire* attitude about the religious apparel of his Catholic teachers, R. 183; religious plaques or insignia on school structures, R. 172; the prior attendance of students at mass, R. 165, 167; and the sale of religious workbooks by schools in his jurisdiction, R. 162, 181, 195. There are six full-time and two part-time Catholic nuns on the faculty of twenty-nine at the subject school. R. 172. Sixteen of the teachers, including the nuns, are Roman

Catholic, and twelve are non-Catholic. R. 178. In the entire jurisdiction of respondent, twenty-seven of the seventy-six teachers are nuns. R. 131, 161. The librarian of the subject school is a nun. R. 130, 243. Some of the nuns at the subject school wore the "veil" and other religious apparel, prefer to be, and are, addressed as "sister" while teaching class. R. 105, 131, 144. Catholic encyclopedias, books and periodicals are in the subject school library. R. 130-132. The library has twenty Catholic periodicals but none from any other religious denomination, R. 242-243, although it is maintained by the school librarian that if publications of other faiths were requested they would be provided. R. 243. The history of schools operated by the respondent is replete with examples of religious instruction, R. 138, 139, 143; the saying of mass before school, R. 197-199; and the sale of religious workbooks in the schools. R. 162, 181, 196, 197. But, at the present time, religious instruction and mass have been discontinued in the schools under the respondent school corporation's jurisdiction, and no religious instruction has been given in the subject school since it has come under the control of the respondent. R. 186. One of the teachers of the Catholic faith, who is a nun, did not know whether she could avoid exposing or teaching her religious views to the students. R. 227. A conclusion by a member of the faculty, who was a nun, was that it would stand to reason that much of the teaching philosophy in the school would reflect Catholic influence and direction. R. 237. (It is not clear whether she refers to books on Philosophy or the school's attitude, however.) In another instance a teacher at the subject school referred to the Catholic Church as the Christian Church. R. 112. Petitioners' children have dropped out of the subject school, R. 99; have been sent elsewhere at great expense, R. 123; or will not be sent there when of sufficient age, R. 86, 150, because of the fear of Catholic indoctrination. Inquiry or reference is made by teachers concerning the religion of

petitioners' children. R. 103, 104, 107, 116-117. Protestant children of petitioners feel discrimination from the teachers who are nuns, R. 120, and Catholic students. R. 112-113. The circumstances at the subject school will tend to cause political affiliation based upon religious belief. R. 86-87. Many of the petitioners actually believe, or consider, the subject school to be a Catholic one. R. 99, 133, 150. The history of the respondent's operation of its schools, in the manner they are operating the subject school, reveals that children are indoctrinated with the Catholic faith. R. 149.

The respondent is further subject to control by the Catholic Church in that, in addition to its lease-purchase of the subject school, it rents thirty-two other classrooms from the Catholic diocese on an annual basis. Other than the Birdseye school, a two-room building at Ferdinand and a three-room building at Schnellville, all of the respondent's classrooms are owned by the Catholic Church. The respondent's superintendent has no alternate plan if the Catholic diocese refuses to rent these classrooms for another year. R. 154-156.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With Decisions of This Court as to What Construction Should Be Given to the First Amendment.

It is well settled that the First Amendment is applicable to state action, and more specifically, to School Board resolutions. **Barnette v. West Virginia State Board of Education** (1943), 319 U.S. 624, 63 S.Ct. 1178, 87 L.ed. 1628. That proposition being beyond dispute, it is clear that the decision below is in direct conflict with decisions of this Court on First Amendment construction. A very brief review of Religion Clause cases reveals the standards of this Court.

The Religion Clauses command that there should be "no law respecting an establishment of religion", the word "respecting" holding special significance, as "(a) law may be one 'respecting' the forbidden objective while falling short of its total realization." **Lemon et al. v. Kurtzman** (1971), —— U.S. ——, 91 S.Ct. 2105, 2111, 29 L.ed.2d 745. The Religion Clauses were intended to afford protection against "sponsorship, financial support, and active involvement of the sovereign in religious activity." **Lemon et al. v. Kurtzman**, *supra*. That case also prohibits situations where the "potential for impermissible fostering of religion is present", and, situations where state assistance to religion will entail responsive political activity.

This Court has enunciated "the rule of neutrality", holding that "(i)n the relationship between man and religion, the State is firmly committed to a position of neutrality." **School District of Abington Tp., Pennsylvania v. Schempp** (1963), 374 U.S. 203, 277, 83 S.Ct. 1560, 10 L.ed. 2d 844; **Walz v. Tax Commissioners of City of New**

York (1970), 397 U.S. 664, 670, 90 S.Ct. 1409, 25 L.ed. 2d 697. Even "subtle departures from neutrality, 'religious gerrymanders' ", are prohibited. **Gillette v. U.S.** (1971), 401 U.S. 437, 453, 91 S.Ct. 828, 28 L.ed. 2d 168.

Another guideline from this Court is also found in **Walz v. Tax Commissioners of City of New York**, *supra*, which can be characterized as "avoidance of excessive entanglements" (397 U.S. at 671).

The facts in the case at bar present multiple departures from this required neutrality, and the entanglements are grossly excessive. These facts (at bar) do not fall squarely within the precedent of any one case, but in the aggregate they present a clear picture of virtual oppression of a religious minority. They show a fear that petitioners' Protestant children are being forced to attend a school which they believe to be a Roman Catholic one. R. 133. That, obviously, is a subjective reaction to petitioners' plight, and many objective reasons exist for granting them relief. However, petitioners urge that subjective views cannot be ignored in Religion Clause cases, because of the very nature of the subject we are considering—one's **beliefs.**

The Court of Appeals acknowledged and recited some of the facts which, as that Court stated it, buttressed petitioners' concern. It then went on to comment upon the trial Court's findings concerning the harmonious consolidation of the Birdseye student body with the new, predominantly Roman Catholic student body. The trial Court seemed impressed because the consolidated student body had agreed upon new school colors, a new school song and a new mascot! The trial Court noted that "no • • • parent objected or complained to school officials to this consolidation in any way." This last remark flies in the face of the fact that there was a suit pending in a state Court of Indiana resisting the consolidation, R. 38, as well as the within action with approximately 140 petitioners.

(Birdseye High School had 104 students its last year of full operation. R. 159).

The other fact which impressed the Court of Appeals was the comparative quality of the Birdseye school facilities with those of the new school, the Court characterizing the former as "outdated".

The theory of this case from its inception, acknowledged by the Court and both sides, has been one of First Amendment violation. That being undisputed, comparative quality of school facilities and harmonious selection of a school mascot are totally irrelevant.

First Amendment rights "are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." **West Virginia School Bd. of Ed. v. Barnette** (1943), 319 U.S. 624, 63 S.Ct. 1178, 87 L.ed. 1171. And, although this Court was speaking of other First Amendment rights, it seems clear that the language in the case of **Thomas v. Collins** (1944), 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.ed. 430, is intended to apply to religious liberties. There, this Court held that "any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. * * * Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." See also **Sherbert v. Verner** (1963), 374 U.S. 398, 407, 83 S.Ct. 1790, 10 L.ed. 2d 965.

Was the Birdseye school building about to collapse and kill or maim the student body? Of it the trial Court said:

> "Since they conducted a high school there last year, I assume it wouldn't be insuperable if the Court would order it." R. 245.

If the reason for the trial and appellate court's decision below can be briefly summarized, it appears to be that

petitioners should correct their provincial attitude. Petitioners believe it may be said, without cynicism, that the Religion Clauses presuppose a certain provinciality. The lower courts also urge the two factions to cooperate. Alas, history does not lend hope for the heeding of this admonition. See **Engel v. Vitale** (1962), 370 U.S. 421, 432, 82 S.Ct. 1261, 8. L.ed.2d 601, and continuing news stories from Belfast, Northern Ireland.

Petitioners have now arrived at the most crucial aspect of this inquiry: What is the most precise point of conflict between the lower Court's decision and a decision of this Court. Brief quotations graphically demonstrate this.

The Court of Appeals says:

> "* * * we are persuaded that the appropriate remedy in this case lies * * * in the direction of unambiguous and vigilant enforcement of the commands of the First Amendment at the modern, integrated school in Ferdinand. * * *"

This Court, in **Lemon v. Kurtzman** (1971), — U.S. —, 91 S.Ct. 2105, 29 L.ed.2d 745, says:

> "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church."

The solution of the Court of Appeals is the very thing prohibited by this Court! And who would maintain the vigilance recommended by the Court of Appeals? The

unsophisticated student body, not *sui juris* for any other purpose? The petitioners, who must earn their bread and in any case cannot attend school with their children? Some sort of heretofore unknown Federal referee? Lemon has already answered these questions, of course.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted

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March 27, 1973

OPINION

In the
United States Court of Appeals
For the Seventh Circuit

September Term, 1972 — September Session, 1972

No. 72-1018

Donald Buford, et al.,
Plaintiffs-Appellants,

v.

The Southeast Dubois County School Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

No. EV 71-C-63
S. Hugh Dillin,
Judge.

Argued October 31, 1972—Decided January 25, 1973

Before Stevens and Sprecher, *Circuit Judges*, and Campbell, *Senior District Judge*.*

Stevens, *Circuit Judge*. In October 1970, defendant School Corporation decided to close the public high school in Birdseye, Indiana, and to transfer the students to a larger and newer school in Ferdinand commencing with the 1971-1972 academic year. The Ferdinand facility had formerly been a Catholic school and was leased by defend-

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

ant from the Evansville diocese. Plaintiffs,[1] Protestant taxpayers and parents from Birdseye, opposed the transfer of their children into the Catholic environment of Ferdinand. In August of 1971 they sought to enjoin the closing of the Birdseye High School, invoking the Establishment Clause of the First Amendment as a basis for federal jurisdiction.[2] The district court refused to enjoin the closing of the Birdseye school, but did order certain changes at Ferdinand. Plaintiffs appeal, contending that no relief short of reopening the Birdseye school, is adequate. The district court's findings demonstrate that such drastic relief is not justified; we therefore affirm.

The Birdseye High School accommodated 104 students in a building constructed before 1900, containing seven rooms, a former office used as a library, a kitchen and a small cafeteria. The school had no toilet or locker facilities. The residents of Birdseye are primarily Protestants. As a result of the closing their children are now attending Forest Park High School in Ferdinand, a larger community with a predominantly Catholic population.

Forest Park High School[3] accommodates 545 students in a facility described by the court as "modern." It was constructed by the Catholic Diocese of Evansville and operated as a parochial school until 1965, when it was leased to the local school authority and converted into a public high school.[4] The change from parochial to public school in 1965 did not immediately eliminate the strong Catholic atmosphere, but apparently no serious problems

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[1] The complaint was originally filed by 141 plaintiffs.

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ." U.S. CONST. Amend. I.

[3] Before consolidation, it was known as "Ferdinand High School."

[4] Finding No. 5.

then arose since the student body was predominantly, if not totally, of the Roman Catholic faith.

Between 1965 and the closing of Birdseye in 1971, the Catholic influence at the Ferdinand school was mitigated in various ways. Religious services and classes were discontinued, religious paintings and artifacts were removed, a Protestant principal and a Protestant guidance director were employed, the number of nuns serving as teachers was reduced, the relative number of Catholic volumes and periodicals in the library was lessened, and the name of the school, its colors and mascot were changed. Plaintiffs' evidence related, in part, to conditions which prevailed before these changes were made. In considering their entitlement to broader relief than the court granted, we limit our attention to the situation as it existed during the 1971-1972 academic year. They contend that the religious orientation of the Ferdinand faculty and surroundings inevitably creates an impermissible violation of their First Amendment rights. Their concern is buttressed by the following facts.

All five members of the Board of the School Corporation are Catholics; since approximately 80% of the voting population in the area is Catholic, Catholic domination of the Board will presumably persist. The high school itself is owned by the Evansville Diocese. It is located near a Catholic convent; religious statuary and other Catholic buildings are also nearby. The 28 teachers on the high school faculty include 16 Catholics, eight of whom are nuns. Prior to the conclusion of the trial, the nuns wore their habits while teaching. The library contains about 20 Catholic periodicals and a relatively large number of books oriented toward Catholic teaching. A number of paintings in the school depict religious themes. Certain portions of the record also suggest that some members of the faculty had a "Catholic attitude" and that

occasional comments by Catholic students made some of the Protestant newcomers uncomfortable.

On the other hand, the court found that careful and cooperative planning by the students themselves minimized the conflict that might otherwise have developed in connection with the consolidation.[5] He recognized that plaintiffs' concerns were genuine and directed that remedial steps be taken. Specifically, he ordered the nuns to discontinue wearing their habits while teaching. He "recommended" that the library maintain a more balanced list of books and periodicals, and "that paintings or art reproductions exhibited in the school not be predominantly of religious scenes or religious in meaning, but that the collection of reproductions of other painters and sculptors, both ancient and modern, be expanded." Finding No. 7.

Defendants have not challenged either the order or the recommendations; plaintiffs have not made any request for additional relief other than a mandate directing that

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[5] "4. During the winter and spring of 1971, the student councils of the high schools at Ferdinand and Birdseye, Indiana, held at least five joint meetings, and several 'mixers' and proposed to the School Board, as a result of these joint meetings, a new name for the school ('Forest Park High School'), new school colors, mascot, and song, all of which were adopted by the School Board of the School Corporation. Perhaps because of this cooperation between the students of the two high schools, the consolidation of the two high schools was carried out quite successfully, since schools [sic] opened this fall and no student or parent objected or complained to school officials to this consolidation in any way.

"The Court is impressed at this display of cooperation between the high school students from Birdseye, Indiana, predominantly Protestant, and the other high school students of the School Corporation, predominantly Roman Catholic. The Court can only hope that this display of cooperation may serve to reassure parents and citizens in other school corporations in Indiana who are faced with similar problems relating to the integration of school facilities, which may be required under the authority of Brown v. The Board of Education, 347 U.S. 483, and subsequent decisions of the United States Supreme Court." Finding No. 4.

the old school at Birdseye be reopened. We are satisfied that the district court acted properly in rejecting this extreme sanction.

The evidence abundantly establishes the reasonableness of the decision to close the old facility at Birdseye; the consolidation was certainly within the Board's power. We accept the sincerity of plaintiffs' concern about the assimilation of their children into a group of students predominantly of a different faith and recognize that subtle influences may be impermissible even though difficult to prove by objective evidence.[6] Nevertheless, we are persuaded that the appropriate remedy in this case lies not in the direction of a return to the outdated facility at Birdseye, but rather in the direction of unambiguous and vigilant enforcement of the commands of the First Amendment at the modern, integrated school in Ferdinand. Indeed, if the manner in which the Ferdinand school is operated violates the Establishment Clause, the reopening of Birdseye would, instead of terminating the violation, probably perpetuate it.

The judgment is

Affirmed.

A True Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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[6] *Cf. Lemon v. Kurtzman*, 403 U.S. 602, 618-619.

JUDGMENT

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 25, 1973

Before

Hon. John Paul Stevens, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. William J. Campbell, Senior District Judge

Donald Buford, et al.,
Plaintiffs-Appellants,

No. 72-1018 vs.

The Southeast Dubois County Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Evansville Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

No. 72-1326

DONALD BUFORD, et al.,

Petitioners,

-vs-

THE SOUTHEAST DUBOIS COUNTY SCHOOL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The Opinion of the Court of Appeals is set forth in the Appendix to the Petition herein. The Order and Memorandum of Decision of the District Court for the Southern District of Indiana is not set forth in the Appendix to the Petition, and is set forth in the Appendix to this "Brief for Respondent in Opposition".

Question Presented

The "Question Presented" as stated in the Petition is not stated in terms of the findings of fact in this case. Petitioners have improperly attempted to raise questions relating to the First Amendment based on selective and inaccurate references to only a part of the evidence. The question presented, properly stated, is whether the District Court was required under the evidence presented to mandate the reopening of an out-dated public high school in Birdseye, Indiana, built before 1900 and closed at the end of the 1970-71 school year, which had only 104 pupils who now attend the public high school of the Respondent public School Corporation located in Ferdinand, Indiana, the Forest Park High School, which building is leased by the Respondent School Corporation from the Catholic Diocese under a long-term lease at a reasonable rental, with the Diocese exercising no control whatsoever over school operations and with no right to do so, and where the District Court specifically found that "a determined effort has been made by school officials to operate the school system in good faith as a public school corporation and to minimize any religious connection between the schools and the Catholic Diocese".

Statement of the Case

Petitioners' "Statement of the Case" distorts the actual facts as found by the District

Court. Petitioners make selective references to certain of the evidence presented as a basis for their legal arguments and theories. Hence Respondent School Corporation is obliged to restate the case in terms of the findings of fact made by the District Court. Page references are to the pages in the Appendix forwarded to this Court by the Clerk of the Court of Appeals for the Seventh Circuit under date of March 14, 1973. Accordingly, facts omitted from the Petition will be set forth therein, together with a correction of inaccuracies in some of the "facts" that the Birdseye Petitioners did make reference to.

The Respondent Southeast Dubois County School Corporation is a public school corporation organized under the Indiana School Corporation Reorganization Act of 1959 and came into existence on January 1, 1969, out of three townships in the southeast part of Dubois County, Indiana, namely Jefferson to the east in which the town of Birdseye is located, Jackson in the center and Ferdinand to the south (11a-12a, 39a).

On or about October 7, 1970, Respondent adopted a plan of consolidation of its school facilities, which plan included the closing of the Birdseye High School at the beginning of the 1971-72 school year (22a). The Birdseye High School, built before 1900, with only 104 students, had a total of seven rooms and a former office used for a library, a kitchen and small cafeteria, with no toilet facilities or student lockers, with only 33 course offerings and with many other deficiencies (175a-177a, 308a-312a, 314a). Forty to forty-five percent of these 104 students were not from Birdseye, but were from the Schnellville area, and consequently were of the Catholic faith (67a, 159a). Former Birdseye High School students were transferred to the high school at Ferdinand, which

opened on August 26, 1971. The high school at Ferdinand is a modern, up-to-date building, which now has 475 students and 60 course offerings for its students (177a, 304a-307a, 314a).

Early in 1971, fifteen members of the student councils of the high schools at Ferdinand and Birdseye, Indiana, held five joint meetings to plan the consolidation of the two high schools. They also held several "mixers" and proposed to the School Trustees, as a result of these joint meetings, a new name for the school ("Forest Park High School"), a new school ring and school mascot, all of which proposals were adopted by the School Trustees of the school corporation (222a-224a). The consolidation of the two high schools was carried out quite successfully. No student or parent has objected or complained in any way to school officials about this consolidation (213a, 220a, 224a, 230a-231a).

Both the Principal of the Forest Park High School (87a, 232a) and the Guidance Director of the Forest Park High School are of the Protestant faith (212a). No student has ever complained to the Guidance Director about any religious influence in the high school (218a). The six nuns teaching in the high school are public school teachers governed by the laws of the State of Indiana and not by the Catholic Archdiocese (172a-173a, 229a, 241a). They are highly qualified teachers duly licensed by the State of Indiana and follow directions from the State Department of Public Instruction (221a, 229a, 235a).

There have been no religious artifacts, objects or statues anywhere in the Forest Park High School since the defendant public school corporation came into existence in January, 1969 (104a, 116a, 171a, 211a). The Guidance Director, a Protestant, stated that the Forest

Park High School looks just like any other public high school in the State of Indiana (212a).

No Catholic services are being held immediately prior to school hours in any of the Catholic churches located near any of the schools in the public school corporation (167a-168a, 184a, 297a). Although some of the nuns used to wear their "habits" or veils, this was a matter of personal choice (183a), and pursuant to the Order of the District Court herein, this practice is to be discontinued (65a).

All the books used in the public school corporation since its formation on January 1, 1969, are contained on the booklist approved by the Indiana Department of Public Instruction, which booklist is required to be used in all public schools in the State of Indiana. No books not contained on this list have been used in the high school during the 1971-72 school year (180a-181a, 299a-303a). Many private non-Catholic groups use the high school facilities such as the Boy Scouts, and all types of civic organizations, and such use is not in anyway limited to Catholic groups (183a). All books and periodicals purchased for the high school library since January 1, 1969, have been authorized and approved by the State Department of Public Instruction of the State of Indiana (235a-236a). Approximately 120 to 130 periodicals are now purchased for the library, of which approximately 20 relate to the Catholic faith and are being phased out (242a). All periodicals purchased are listed by title and submitted to the Indiana Department of Public Instruction (243a). Any request by any student for a religious publication of any particular faith would be taken into consideration (243a), but no such request has been received to date. In the future, materials having a religious orientation be eliminated or writings reflecting the beliefs of Protestant denominations as well as those

of the major non-Christian religions be made available to students, according to the Court Order (65a).

The high school library has a set of Catholic encyclopedias and also sets of non-Catholic encyclopedias, such as a set of Compton's and Americanas (132a). The library also has books by non-Catholic religious leaders such as Norman Vincent Peele, The Gideon Bible, Malcolm Boyd and a non-denominational interpretation study of the Bible used for literature courses, and back issues of the Christian Herald publication (238a-239a).

The Forest Park High School is located four blocks from the Catholic Church in Ferdinand, Indiana. Between the high school and the Catholic Church in these four blocks are located a privately-owned lumber yard and a number of privately-owned residences, along Jefferson Street, a public highway (90a, 205a, 210a). The High School is on a public street, and the school grounds are bounded on two sides by public streets (211a) and on at least two sides by privately-owned property, and not by Church property (211a).

No religious instructions have ever been given in the public high school in Ferdinand, Indiana (186a, 218a).

The Catholic Diocese retains no say-so over the use and occupancy of the high school buildings (163a). Lessee has possession of the building, which must be used in accordance with Indiana law and proper governmental authorities (327a). Upon the exercise of its option to purchase at the end of the lease term, the high school building will become the property of the public school corporation. No purchase price need be paid at that time because the lease rental payments during the term of the lease will be equal to and are to

be applied on the purchase price (324a, 327a). This lease was approved by the Indiana State Board of Tax Commissioners on September 1, 1971, after a finding that a necessity exists and that the agreement was fair and reasonable (95a, 316a). The salary of the Superintendent of Schools (as well as all other employees of the school corporation) is paid by the taxpayers (248a).

Only four of the Petitioners testified at the trial. Of the four, only two had any child that ever attended the Forest Park High School. One of these parents testified that his daughter there was "getting along all right" so far as he knew (152a).

This same parent observed that his son attending the elementary school in St. Anthony, Indiana, may have received "Catholic indoctrination" (149a). However, this incident happened in 1960 (151a), and does not relate in any way to the Forest Park High School which is the subject of this lawsuit.

None of the parents had ever visited the Forest Park High School during school hours (91a, 144a), or had never discussed their fears of "Catholic influence" with any of the school officials themselves (92a, 213a).

Four students testified at the trial in support of this attempt to re-open the Birdseye school. One of these was a girl residing in Birdseye who quit school rather than go to the high school in Ferdinand, Indiana, because she considered it a "Catholic school". She had never been inside the Forest Park High School at Ferdinand, and had never discussed her concerns with any of the school officials (99a-100a). On one occasion when a group of students went to the library to get reference materials on an assigned paper in Health, the librarian was careful to indicate the separate

location of non-Catholic and Catholic source materials in the library, and even pulled out from the library shelves herself, the non-Catholic source materials for the use of the non-Catholic students (237a). The student relating this incident got one of the non-Catholic books for her own paper (107a). Another girl stated that the teacher commented one day during an English class studying Anglo-Saxon England, that more than one-half of the class was Catholic (111a), her only concern being she did not want to be mistaken for a Catholic (117a). Although this girl also said "They call us names", and that she did not feel welcome (113a), students from Birdseye in general have adjusted well to the high school in Ferdinand (213a, 220a, 224a, 230a-231a). Twenty percent of the students at the Forest Park High School are from the Birdseye area, but they constitute twenty-eight percent of the elected student officers (314a).

A high school student mentioned that there are reproductions of paintings in the high school that are of a "religious" theme (116a). However, these reproductions are of masterpieces of art painted by Renoir, Rembrandt, Picasso, and Velaquez, and are displayed for their artistic merit and not as a matter of religion (225a, 230a). Pursuant to the Court Order, the collection of reproductions of painters and sculptors, both ancient and modern, will be expanded (65a).

The Superintendent of Schools has taken whatever action is appropriate to eliminate any "religious influence" in the school system. As soon as he became Superintendent of Schools in January, 1969, he saw to the immediate removal of a statue on the high school grounds (171a). Under his leadership, the religious instructions given in the elementary schools, even before school hours, was eliminated at

the commencement of the 1971-72 school year (185a, 198a). The number of nuns teaching in the high school is decreasing each year under his leadership (179a).

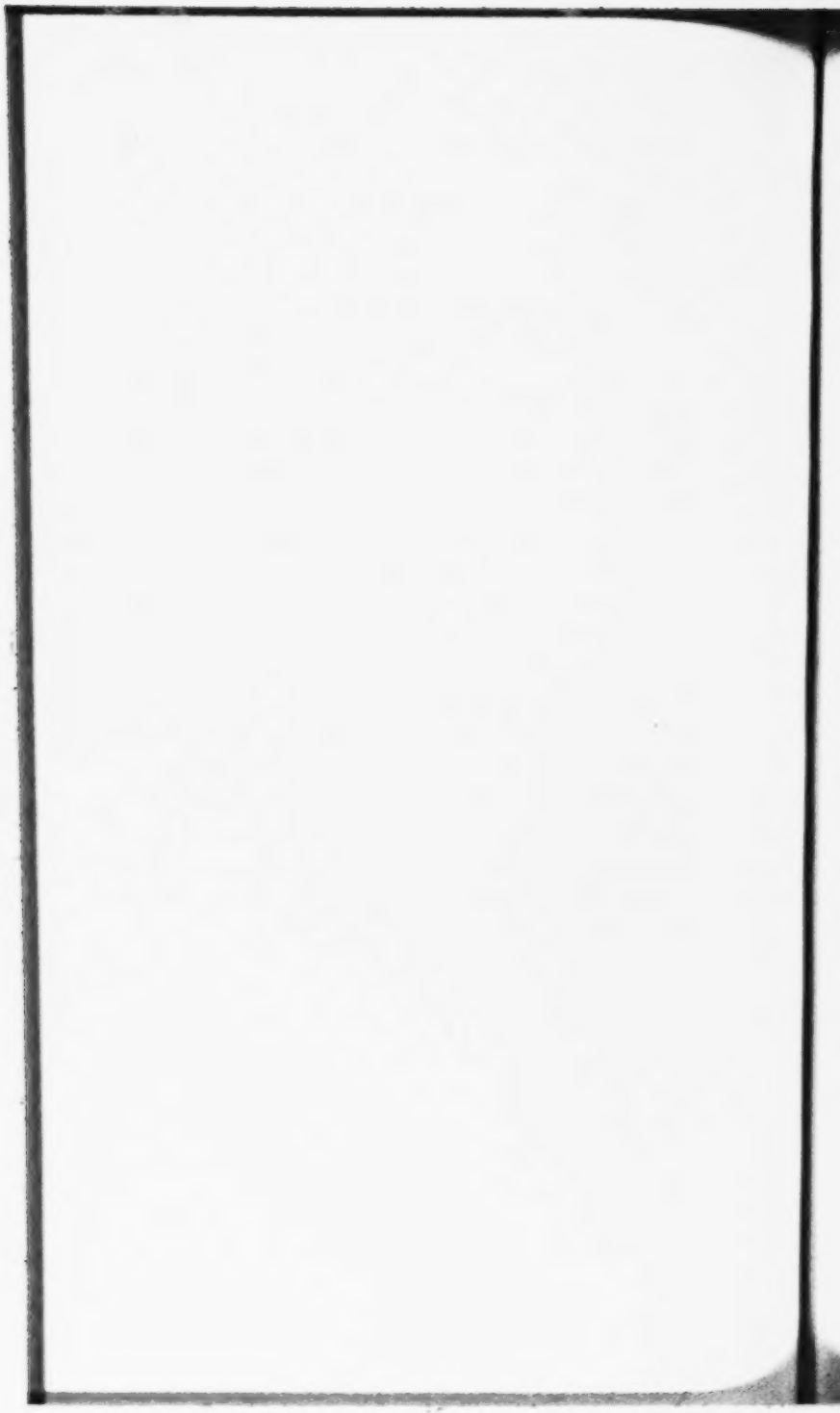
Argument

I.

Decision Not In Conclict With Any Decision Of This Court

Petitioners argue that the decision of the Court of Appeals herein conflicts with a decision or decisions of this Court, a consideration for certiorari contained in Supreme Court Rule 19.

In support, Petitioners cite cases on the general subject of the establishment clause of the First Amendment to the United States Constitution that have been decided in recent years by the United States Supreme Court (p.8-11). However, Petitioners do not even purport to set forth the finding or holding in these cases to argue that they "conflict" with the decision of the Court of Appeals herein. Petitioners quote certain language from these cases, but this language, not placed in the context of the case itself, cannot support a serious argument under Supreme Court Rule 19. These cited cases hold that a state may not enact a law which provides that all public school children shall attend morning bible-reading exercises (School District of Abington Township, Pennsylvania v. Edward Lewis Schempp (1963) 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844); that New York Schools cannot have a prayer in a public school room even though certain students were permitted to remain silent (Engel v. Vitale (1962) 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601); that a property tax exemption for religious organizations is lawful because the legislative purpose is neither the advancement nor the inhibition of



religion and the end result or effect of the exemption does not result in excessive government entanglement with religion (Walz v. Tax Commission (1970) 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697); that a state cannot force public school pupils to salute the flag while reciting the pledge of allegiance, under penalty of expulsion (West Virginia School Board of Education v. Barnette (1943) 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1171); and that state aid for parochial schools in Pennsylvania and Rhode Island is unconstitutional (Lemon, et al. v. Kurtzman (1971) 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745).

After this generalized survey of First Amendment cases, Petitioners arrive at the apparent reason for their filing, and state (p. 11) "the most precise point of conflict" with a decision of this Court, to be a portion of a sentence in the concluding paragraph of the Opinion of the Court of Appeals herein, said to be in conflict with the Lemon case, supra. The decision of this Court in this Lemon case is based upon the fact that the schools to be furnished public funds were in fact a part of the parochial school system and owned and operated by the Roman Catholic Church. This Court lays great stress on this determining factor, stating that the schools involved were "church schools", the school buildings containing "identifying religious symbols such as crosses on the exterior and crucifixes, religious paintings and statues either in the classrooms or hallways", with religious instructions for 30 minutes a day and "religiously oriented extra-curricula activities", with "approximately two-thirds of the teachers in the schools nuns of various religious orders". Accordingly the "parochial schools" were "an integral part of the religious mission of the Catholic Church" and the "various characteristics of the schools make

them 'a powerful vehicle for transmitting the Catholic faith to the next generation.'" (29 L. Ed. 2d at p. 757)

None of these characteristics of a parochial school system exist at the Forest Park High School today, as shown herein in the Statement of the Case in this Brief of the Respondent public School Corporation.

The fact that the schools are parochial schools was extremely important. The Court continued (29 L. Ed. 2d at p. 758-9):

> "In our view the record shows these dangers are present to a substantial degree. The Rhode Island Roman Catholic elementary schools are under the general supervision of the Bishop of Providence and his appointed representative, the Diocesan Superintendent of Schools. In most cases, each individual parish, however, assumes the ultimate financial responsibility for the school, with the parish priest authorizing the allocation of parish funds. With only two exceptions, school principals are nuns appointed either by the Superintendent or the Mother Provincial of the order whose members staff the school. By 1969 lay teachers constituted more than a third of all teachers in the parochial elementary schools, and their number is growing. They are first interviewed by the superintendent's office and then by the school principal. The contracts are signed by the parish priest, and he retains some discretion in negotiating salary levels. Religious authority necessarily pervades the school system.

> The schools are governed by the standards set forth in a 'Handbook of School Regulations,' which has the force of synodal law in the diocese. It emphasizes the role and importance of the teacher in parochial schools: 'The prime factor for the success or failure of the school is the spirit and personality, as well as the professional competence, of the teacher . . . . ' The Handbook also states that 'Religious for-courses; nor is it restricted to a single subject area.' Finally the Handbook advises teachers to stimulate interest in religious vocations and missionary work. Given the mission of the church school, these instructions are consistent and logical."

In the instant case, there is no evidence in the record that the Catholic Diocese wanted to, attempted to, or did in fact in any way control any of the schools in the public school system, or any of its teachers, including in particular the teachers at the Forest Park High School.

Petitioners argue (p. 11) that the Opinion of the Court of Appeals herein conflicts with certain other language in this Lemon case, supra, that a "comprehensive, discriminating, and continuing state surveillance will inevitably be required", if the Court in that case would allow public monies to be paid to teachers in a parochial school. But a statement that a state would inevitably be drawn into the "surveillance" of teachers in a parochial school system, where otherwise the state would not have to undertake any such surveillance at all if no public monies

were paid to the parochial schools for teacher salaries, does not "conflict" in any way with this decision of the Court of Appeals herein. In a public high school as here, where the state already has a duty by state law to provide a public school system and to supervise all public school teachers, public school authorities are already obligated to see to the "unambiguous and vigilant enforcement of the commands of the First Amendment", which is their constitutional obligation under the Constitution of the United States, even without this judicial admonition of the Court of Appeals.

Petitioners apparently are arguing that this language in the Lemon case, supra, taken out of context, would prohibit teachers of the Roman Catholic faith, whether nuns or lay teachers, who are otherwise qualified, from teaching in the public school system in the State of Indiana, simply because they would have to be "inspected" to determine their "personal beliefs". Neither the Lemon case, supra, or any other decision of this Court has ever so ruled.

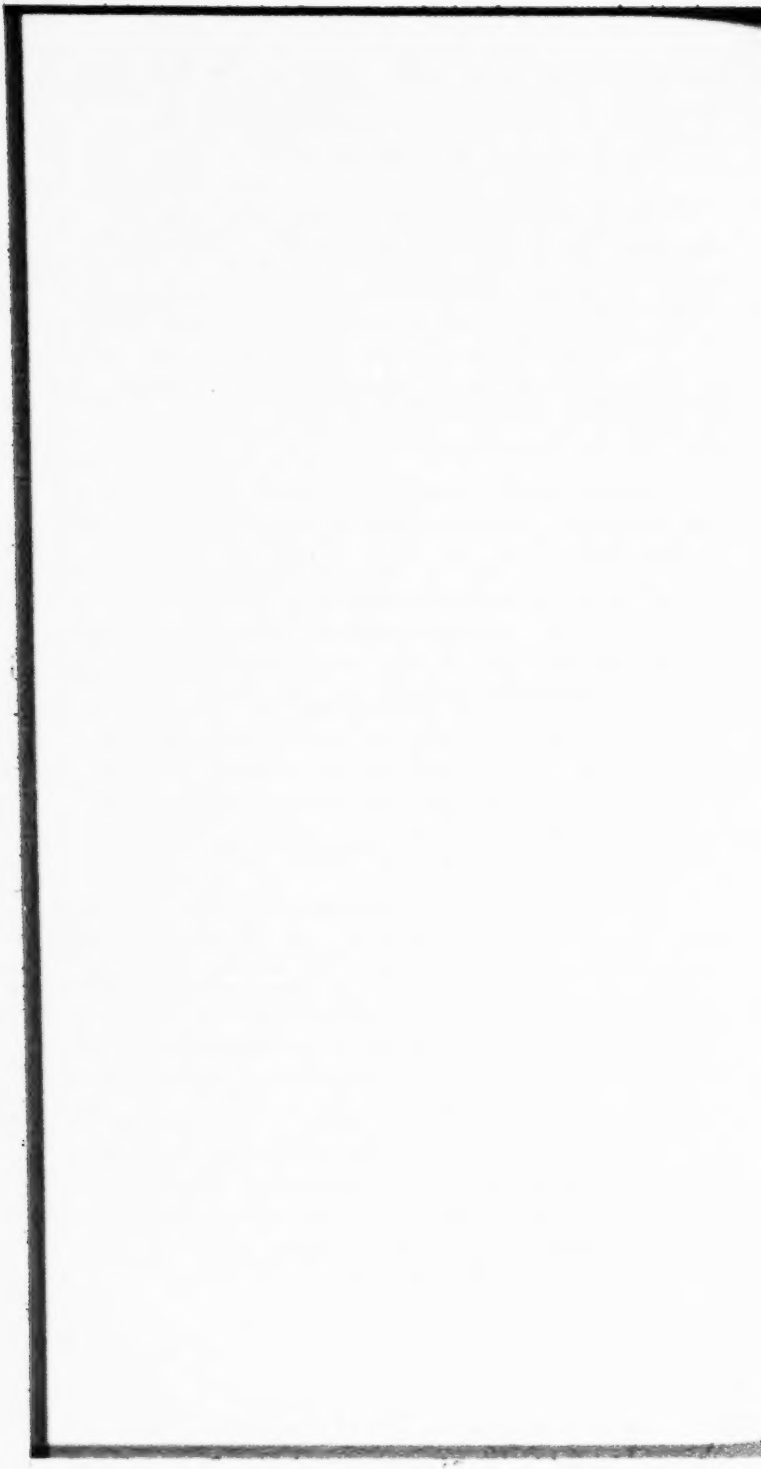
In Board of Education v. Allen (1968) 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060, this Court upheld a state statute which required that local school boards purchase textbooks and lend them without charge to all children in grades 7 to 12 of schools which complied with the compulsory education law without regard to whether such schools were public or private. Noting that the ownership of the books remained technically in the state, that no funds or books were furnished to parochial schools, and that the financial benefit was to parents and children rather than to the schools, the Court held that teachers in a sectarian school could constitutionally teach secular subjects to parochial school students using textbooks purchased by

the state, and that such instruction did not necessarily create an "unconstitutional involvement of the state with religious instruction" (20 L. Ed. 2d at 1068).

This Court also held that teachers in the public school system have a First Amendment right of free speech that must be respected by school authorities. Pickering v. Board of Education (1968) 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811. See also Keyishian v. Board of Regents of the Univ. of New York (1967) 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629.

There is no "conflict". In its Opinion, the Court of Appeals herein made special note of the fact that the only relief requested was the re-opening of the Birdseye School, and held (A-2, A-4-5) that the "district court's findings demonstrate that such drastic relief is not justified; we therefore affirm . . . . Defendants have not challenged either the order or the recommendations; Plaintiffs have not made any request for additional relief other than a mandate directing that the old school at Birdseye be re-opened. We are satisfied that the district court acted properly in rejecting this extreme sanction".

In its concluding paragraph, citing this very Lemon case in support, by way of dictum and as a guide to the parties in the future, the Court of Appeals in its Opinion suggests that "the appropriate remedy" here would be for the Respondent School Corporation and the Petitioners, as school patrons, to see to the "vigilant enforcement of the commands of the First Amendment, at the modern, integrated school in Ferdinand". These "commands" had already resulted in the "remedial steps" (A-4) ordered by the District Court, that the nuns discontinue wearing their habits while teaching; that the library contain a more



balanced list of books and periodicals, that paintings or art reproductions exhibited in the school not be predominantly of religious scenes or religious in meaning, and that the collection of reproductions of other painters and sculptors, both ancient and modern, be expanded". The Opinion refers to Finding No. 7 of the District Court, which also states that all books and periodicals purchased for the high school library since January 1, 1969, were authorized and approved by the State Department of Public Instruction of the State of Indiana and are "secular" in content, and takes note that approximately 120 periodicals are now being purchased, and only 20 periodicals relate to the Roman Catholic faith.

This Court has already recognized that the establishment clause in the First Amendment to the United States Constitution would not prevent the use by a public school corporation of buildings formerly occupied by parochial schools, and that Respondent School Corporation may properly lease school facilities from a Catholic Diocese. In State of Nebraska ex rel. The School District of Hartington v. Nebraska State Board of Education (1972) _____Nebr._____, 195 N.W.2d 161, cert. den. ___U.S.___, ___S.Ct.____(1972), 34 L. Ed. 2d 182, the Nebraska Supreme Court upheld against an establishment clause argument the validity of a lease by a public school corporation not of an entire school building, but a lease of only two classrooms in an existing parochial high school conducting classes at the same time. In this case, the majority opinion of the Nebraska Supreme Court held that the lease arrangement did not violate the First Amendment to the United States Constitution saying (p. 163):

> "The First Amendment to the Constitution of the United States provides: 'Congress shall make

no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *.'

* * * * *

If the property used or leased is under the control of the public school authorities and the instruction offered is secular and nonsectarian, there is no constitutional violation. The lease in this case meets these requirements. We find no 'excessive entanglement' between government and religion in the lease involved in this case. See Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L. Ed. 2d 697."

This Court denied certiorari, with a dissenting opinion by Mr. Justice Douglass with whom Mr. Justice Marshall concurred, and with a separate opinion by Mr. Justice Brennan stating his reasons for joining in denying the petition for certiorari.

This particular denial of this petition for certiorari to the Supreme Court of Nebraska is instructive for the reasons set forth in United States v. Kras (1972) ___U.S.___, 93 S.Ct.____, 34 L. Ed. 2d 26, as follows (p. 634):

"Thus, although a denial of certiorari normally carries no implication or inference, Chessman v. Teets, 354 US 156, 164, 1 L Ed 2d 1253, 77 S Ct 1127, n 13 (1957); Brown v Allen, 344 US 443, 97 L Ed 469, 73 S Ct 397 (1953), the pointed dissents of Mr. Justice Black and Mr. Justice Douglas to the denial in Garland

so soon after Boddie, and Mr. Justice Harlan's failure to join the dissenters, surely are not without some significance as to their and the Court's attitude about the application of the Boddie principle to bankruptcy fees."

Mr. Justice Brennan in his opinion relied on the fact (as in the instant case) that "the Hartington School District would have full control over the classrooms and the educational programs; and that no objects, pictures, or other articles having a religious meaning or connotation would be in the classrooms. The lease represented the complete extent of the relations between the School District and the (parochial) school".

Mr. Justice Douglas in his opinion emphasized the fact that the State of Nebraska would be financing instruction in a "parochial school", and quoted the dissent in the Nebraska Supreme Court decision, that "we are not dealing with . . . a mere lease agreement", and that"this procedure requires that the state will be amidst the daily affairs of a religious school".

Obviously, the facts in the instant cause present an equally strong, if not stronger, case for denial of the petition for certiorari. Here the Catholic Diocese no longer operates any schools within the boundaries of the Respondent School Corporation, and the high school facilities are leased under a lease approved by the State of Indiana, with possession and control of the entire school facilities in the Respondent School Corporation.

Finally, Respondent School Corporation would suggest to this Court that Petitioners, in addition to their First Amendment concerns,

also resent the closing of their neighborhood public high school in Birdseye, Indiana, and object to the geographic inconvenience of their children attending the public high school in Ferdinand, Indiana. Their complaint in this cause objecting to conditions in the Forest Park High School was filed August 24, 1971 (1a), even before the Forest Park High School had opened its doors on August 26, 1971, following the school consolidation (10a). Furthermore, Petitioners, in their complaint previously filed in the State court in Indiana, as a part of their requested relief, had picked out an exact location for a new public high school outside of Ferdinand, Indiana, to be built by the Respondent School Corporation (310a).

Conclusion

For the foregoing reasons, Respondent respectfully prays that the Petition be denied.

Respectfully submitted,

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April, 1973

RESPONDENT'S APPENDIX

Memorandum of Decision

COURT'S MEMORANDUM OF DECISION

(Filed September 24, 1971)

* * * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

DONALD BUFORD, Et Al.,	)	
	)	
Plaintiffs,	)	
	)	
	)	
-vs-	)	NO. EV 71-C-63
	)	
	)	
THE SOUTHEAST DUBOIS COUNTY SCHOOL CORPORATION,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION

This motion filed August 24, 1971, is a complaint by certain taxpayers and residents of the defendant Southeast Dubois County School Corporation for an injunction to enjoin the defendant School Corporation from closing the Birdseye High School located within the School Corporation at Birdseye, Indiana.

Pursuant to order of this Court, hearing on plaintiffs' request for temporary injunction was held at Evansville, Indiana, on Thursday, September 16, 1971. At the conclusion of the hearing on the application for a temporary injunction, the parties stipulated and agreed that the trial of the action on the merits should be advanced and consolidated with this hearing on the application for a temporary injunction, and the Court ordered such advancement and consolidation.

The Court has considered the testimony and exhibits taken in evidence at the hearing, the trial memorandum of the defendant, the posttrial arguments of counsel, and has taken judicial notice of certain facts believed to be matters of common knowledge, and now files its findings of fact and conclusions of law in the form of this memorandum. Rule 52(a), Federal Rules of Civil Procedure.

I.

General

This is an action asserting certain rights under the First Amendment to the United States Constitution, which prohibits the making of a law "respecting an establishment of religion or prohibiting

the free exercise thereof." The Court is aware that these provisions of the First Amendment to the United States Constitution have been "read into" the Fourteenth Amendment, although the Court's jurisdiction in this regard is not made explicit in the complaint itself. This action is brought against the School Corporation, although jurisdiction may be limited to persons acting under color of law, and a school district (as opposed to its individual members) does not come within the ambit of the Civil Rights Act, Title 28, United States Code, §§1343(3) and (4). Monroe v. Pape, 365 U.S. 167. But no objection having been raised to any jurisdictional defects, if any, this Court will proceed to determine the First Amendment issues in this cause; as to any other issues sought to be raised by plaintiffs, the Court finds that it has no jurisdiction to consider the same.

1. The plaintiffs described themselves as taxpayers "of the Protestant faith" residing in or near the town of Birdseye, Indiana. The residents and taxpayers in the remainder of the School Corporation are predominantly of the Roman Catholic faith.

2. The Southeast Dubois County School Corporation was formed under the School Corporation Reorganization Act of 1959 and came into existence on January 1, 1969, out of three townships in the southeast part of Dubois County, Indiana, namely Jefferson to the east in which the town of Birdseye is located, Jackson in the center and Ferdinand to the south.

3. On or about October 7, 1970, the School Corporation adopted a plan of consolidation of its school facilities, which plan included the closing of the Birdseye High School at the beginning of the 1971-72 school year. The Birdseye High School, built before 1900, with only

104 students, had a total of seven rooms and a former office used for a library, a kitchen and a small cafeteria, with no toilet facilities or student lockers, with only 33 course offerings and with many other insufficiencies. Former Birdseye High School students were transferred to the high school at Ferdinand, which opened on August 26, 1971. The high school at Ferdinand is a modern, up-to-date building, which now has 475 students and 60 course offerings to its students.

4. During the winter and spring of 1971, the student councils of the high schools at Ferdinand and Birdseye, Indiana, held at least five joint meetings, and several "mixers" and proposed to the School Board, as a result of these joint meetings, a new name for the school ("Forest Park High School"), new school colors, mascot, and song, all of which were adopted by the School Board of the School Corporation. Perhaps because of this cooperation between the students of the two high schools, the consolidation of the two high schools was carried out quite successfully, since schools opened this fall and no student or parent objected or complained to school officials to this consolidation in any way.

The Court is impressed at this display of cooperation between the high school students from Birdseye, Indiana, predominantly Protestant, and the other high school students of the School Corporation, predominantly Roman Catholic. The Court can only hope that this display of cooperation may serve to reassure parents and citizens in other school corporations in Indiana who are faced with similar problems relating to the integration of school facilities, which may be required under the authority of Brown v. The Board of Education, 347 U.S.

483, and subsequent decisions of the United States Supreme Court.

5. In converting the former parochial high school to a public high school in 1965, and particularly since the existence of the defendant School Corporation, commencing January 1, 1969, a determined effort has been made by school officials to operate the school system in good faith as a public school corporation and to minimize any religious connection between the schools and the Catholic Diocese. During the current school year, in the high schools, there are sixteen teachers of the Catholic faith, either of whom are nuns who are certified and licensed by the State of Indiana, and twelve teachers who are of the Portestant faith. Both the Principal of the Forest Park High School and its Guidance Director are of the Protestant faith. No religious instructions have been given in the high school building for many years. All religious statues, artifacts and symbols of the Catholic faith were removed from the high school at Ferdinand shortly after the formation of the defendant School Corporation. Although not directly involved in this lawsuit, some evidence was heard at [illegible]ial concerning the elementary schools of the School Corporation. It is the recommendation of this Court that the decision of school officials not to hold any religious instructions in any of the classrooms in any of the elementary schools during the school week be continued in the future. It is the further recommendation of this Court that the principals of the elementary schools make sure that the schools do not handle the sale of any religious workbooks, even if separate accounts are kept, and that school officials be sure that bus schedules are designed to accommodate the students attending classes in the public schools, and are not scheduled to coordinate necessarily with the times of any

church services before or after school hours. Again, although not directly involved in this lawsuit, the Court also recommends that any statuary or other Catholic artifacts of religious significance be removed from grade school classrooms and from the grade school property itself.

6. The high school at Ferdinand is leased over a period of years from the Catholic Diocese, with the building to belong to the School Corporation at the end of the lease for a total yearly rental of approximately $550 per room. The grade schools in Ferdinand, Indiana, and in St. Anthony, Indiana, are leased from the Catholic Diocese at a total yearly rental of approximately $550 per room. A basement room in the Catholic Church in Schnellville, Indiana, is leased from the Catholic Diocese for $550 a year, for use as a cafeteria and kindergarten. These rental charges seem reasonable. A frame building at Schnellville and the grade school at Birdseye are owned by the School Corporation as is the former Birdseye High School, which is not partially used by grade school students.

7. All books and periodicals purchased for the library since January 1, 1969, have been authorized and approved by the State Department of Public Instruction of the State of Indiana. Approximately 120 periodicals are now being purchased, of which approximately 20 are periodicals relating to the Roman Catholic faith. Such books purchased since January 1, 1969, might be called "secular" in content. The Court would, again, enter no specific order, but would recommend that school officials review their subscriptions of current periodicals and book lists so that either materials having a religious

orientation be eliminated, or that writings reflecting the beliefs of Protestant denominations represented in the County, as well as those of the major non-Christian religions be made available to students. In any event, it should be understood that such materials are merely to be available for examination by such students as desire to read them, and the same should not be required to be used for assigned work. The Court also recommends that paintings or art reproductions exhibited in the schools not be predominantly of religious scenes or religious in meaning, but that the collection of reproductions of other painters and sculptors, both ancient and modern, be expanded.

II.

Order of the Court

IT IS HEREBY ORDERED that the application of the plaintiffs, on First Amendment grounds, to enjoin the defendant Southeast Dubois County School Corporation from closing the Birdseye High School, or, in the alternative, to mandate the reopening of the Birdseye High School, is hereby denied.

IT IS FURTHER ORDERED that the defendant Southeast Dubois County School Corporation take steps forthwith to see to it that its teachers who are nuns of the Roman Catholic faith shall not wear their habits or their veils while teaching in the school system. The Court does not purport to decree what manner of dress would be appropriate for these teachers, in any detail, but would suggest that their clothing be of a color and style that avoids the appearance of uniformity, or a uniform, in order that in appearance they might not be otherwise distinguishable from other teachers.

Memorandum of Decision

IT IS FINALLY ORDERED AND ADJUDGED that the plaintiffs pay the costs of this action.

Entered this 24th day of September, 1971, as per oral findings and order of September 16, 1971.